No. 80-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SUSAN PAXMAN AND LESLIE GOUGH,
Petitioners,

v.

HENRICO COUNTY SCHOOL BOARD
AND
ALBEMARLE COUNTY SCHOOL BOARD,
ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES L. SANDERLIN*
JOHN W. BURKE, III
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
(804) 644-4131

Attorneys for Albemarle County School Board

WILLIAM G. BROADDUS*
County Attorney for
Henrico County
P. O. Box 27032
Richmond, Virginia 23273
(804) 747-4342

Attorney for Henrico County School Board

September, 1980

*Counsel of Record

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit improperly deny petitioners an award of back pay by refusing to recall its Mandate in *Paxman, et al.* v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980), in order to apply retroactively *Owen* v. *City of Independence, Missouri,* 48 U.S.L.W. 4389 (April 16, 1980)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT:
The Court Should Refuse To Grant The Writ Of Certiorari Or, In The Alternative, If It Grants The Writ, Summary Reversal Is Inappropriate 3

ARGUMENT 3

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Becker v. *Beaudoin*, 261 A.2d 896 (R.I. 1970) 8

Brown v. *City of Omaha*, 160 N.W.2d 805 (Neb. 1968) 8

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 5, 6, 10

Cipriano v. *City of Houma*, 395 U.S. 701 (1969) 5

City of Fairbanks v. *Schaible*, 375 P.2d 201 (Alaska 1962) 8

City of Los Angeles v. *Manhart*, 435 U.S. 702 (1978) 10

City of Phoenix v. *Rolodziejski*, 399 U.S. 204 (1970) 5

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632 (1974) .....Passim

Cohen v. *Chesterfield County Board of Education*, 474 F.2d 395 (4th Cir. 1973) (en banc) *rev'd sub nom., Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974) 2, 5

Colby v. Carney Hospital, 254 N.E.2d 407 (Mass. 1969) 8

Hicks v. *State of New Mexico*, 544 P.2d 1153 (N.M. 1975) 8

Holytz v. *City of Milwaukee*, 115 N.W.2d 618 (Wis. 1962) 8

Jackson v. *City of Florence*, 320 So.2d 68 (Ala. 1975) 8

PREVIOUS PAGE WAS BLANK

Page

Jones v. *State Highway Commission*, 557 S.W.2d 225 (Mo. 1977) 8
Kojis v. *Doctors Hospital*, 107 N.W.2d 292 (Wis. 1961) 8
Lemon v. *Kurtzman*, 411 U.S. 1972 (1973) 5
Merrill v. *City of Manchester*, 332 A.2d 378 (N.H. 1974) 8
Molitor v. *Kaneland Community Unit District No. 302*, 163 N.E. 2d 89 (Ill. 1959), *cert. den.*, 362 U.S. 698 (1960) 8
Monell v. *Department of Social Services*, 436 U.S. 658 (1978) ..... Passim
Monroe v. *Pape*, 365 U.S. 167 (1961) 6
Oroz v. *Board of County Commissioners*, 575 P.2d 1155, (Wyo. 1978) 8
Owen v. *City of Independence, Missouri*, 48 U.S.L.W. 4389 (April 16, 1980) ..... Passim
Parish v. *Pitts*, 429 S.W.2d 45 (Ark. 1968) 8
Parker v. *Port Huron Hospital*, 105 N.W.2d 1 (Mich. 1960) ... 8
Paxman, et al. v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980) 1, 2
Paxman, et al. v. *Campbell, et al.*, Nos. 75-1506, *et al.* (4th Cir., July 22, 1980) 2, 4
Paxman, et al. v. *Wilkerson, et al.*, 390 F.Supp 442 (E.D.Va. 1975) 2
Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 7
Smith v. *State of Idaho*, 473 P.2d 937 (Idaho 1970) 8
Spanel v. *Mounds View School District*, 118 N.W.2d 795 (Minn. 1962) 8
Williams v. *City of Detroit*, 111 N.W.2d 1 (Mich. 1961) 8

Statutes

42 U.S.C. § 1983 6

Other Authorities

Comment, *The Role of the Courts In Abolishing Governmental Immunity*, 1964 Duke L.J. 888 9
Currier, *Time and Changes In Judge-Made Law: Prospective Overruling*, 51 Va. L. Rev. 201 (1965) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-270

SUSAN PAXMAN AND LESLIE GOUGH,
Petitioners,

V.

HENRICO COUNTY SCHOOL BOARD

AND

ALBEMARLE COUNTY SCHOOL BOARD,
ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Paxman, et al. v. *Campbell, et al.*, Nos. 75-1506, *et al.* (4th Cir., July 22, 1980) (denying motion to recall the mandate) (See Appendix p. 1a).

Paxman, et al. v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980).

Paxman, et al. v. *Wilkerson, et al.*, 390 F. Supp. 442 (E.D. Va. 1975).

STATEMENT OF THE CASE

This litigation began December 6, 1971, when two teachers, Susan Paxman and Leslie Gough, filed a class action against members of the Albemarle and Henrico County School Boards challenging their maternity leave policies. In 1972, both Albemarle and Henrico voluntarily rescinded their maternity leave policies and did not seek to reestablish them despite a 1973 decision from the Fourth Circuit Court of Appeals, sitting en banc, upholding similar maternity leave policies.[1]

The challenged maternity leave policy of each respondent provided for reinstatement following the end of the teacher's pregancy. Both petitioners were wives of university students who were in their respective communities on a temporary basis only. Neither petitioner has at any time following termination of pregnancy requested reinstatement. An award of back pay in this case as an adjunct to reinstatement is a misnomer.

---

[1] *Cohen* v. *Chesterfield County Board of Education*, 474 F.2d 395 (4th Cir. 1973) (en banc) *rev'd sub nom., Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

SUMMARY OF ARGUMENT

This Court Should Refuse To Grant The Writ Of Certiorari Or, In The Alternative, If It Grants The Writ, Summary Reversal Is Inappropriate

This Court should not grant the Petition For Writ Of Certiorari because the Fourth Circuit Court of Appeals expressly and specifically designated a method by which petitioners could pursue the relief they request. Moreover, the Court's prior decisions are controlling and dictate that *Owen, Monell* v. *Department of Social Services,* 436 U.S. 658 (1978) and *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974) should not be applied retroactively to *Paxman.* If the Court's prior decisions are not controlling on the issue of retroactivity, then the Court should not apply *Owen, Monell* and *LaFleur* retroactively without full briefing and argument of this issue, which has substantial impact on public schools and local governments.

ARGUMENT

In their Petition for Writ of Certiorari, Susan Paxman and Leslie Gough ask the Court to apply retroactively the rules established by *Owen, Monell* and *LaFleur.* Petitioners state that the "obvious conflict between the Fourth Circuit's decision below and the Supreme Court's decision in *Owen, supra,* mandates that this Court grant certiorari in this matter and summarily reverse the Fourth Circuit's decision."[2] By failing to mention the question of retroactivity, petitioners seek to have this Court gloss over the question of retroactive application of these decisions. The relief petitioners seek could have devastating consequences for local treasuries.

---

[2] Petition for Writ of Certiorari, p. 6.

The writ sought is procedurely and substantively unnecessary. On July 22, 1980, the Fourth Circuit Court of Appeals ruled that the petitioners' request that *Owen* be applied retroactively should be presented in the first instance to the district court.[3] This Court therefore should not grant the writ because petitioners have a specifically designated forum in which to pursue the relief they request. Petitioners raise the specter that they "may be the only persons in their class denied relief in the form of back pay."[4] Petitioners should not be heard to raise this imaginary inequity when, in pursuing relief, they have elected to ignore the method provided by the Court of Appeals. A grant of the writ is unnecessary as petitioners have another appropriate forum open to them; and denial of the writ will produce no inequity or unfair treatment.

A further and more fundamental reason why this Court should not grant the writ is that prior decisions of the Court control and dictate that the trilogy, *Owen, Monell* and *LaFleur,* should not be applied retroactively to the Henrico County and Albemarle County School Boards.[5] Each of these cases was decided after the actions of the respondents that gave rise to the petitioners' claims and after the policies in question had been repealed by each of the school boards involved.

---

[3] *Paxman, et al.* v. *Campbell, et al.,* Nos. 75-1506, *et al.* (4th Cir., July 22, 1980) (denying Motion to Recall Mandate). See Appendix, p. 1a.

[4] Petition for Writ of Certiorari, p. 7.

[5] The reasons why *Owen, Monell* and *LaFleur* should not be applied retroactively were addressed in the proceedings below. *See* Response of Appellants, Clarence S. McClure, Comer Smith, Douglas White, Allen Kindrick, Carl M. VanFossen, H. Edward Chapman, and Rodger Rinehart, Jr., Members of The Albemarle County School Board, To Appellees' Motions To Recall Mandate And to Direct District Court To Stay Entry Of Judgment, pp. 7-17 (filed May 2, 1980); Henrico County Appellants' Memorandum In Opposition To Motion

Under the rationale of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), *Owen, Monell* and *LaFleur* should not be applied retroactively. *Chevron* remains the benchmark for the retroactivity question.[6] There, this Court stated:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."[7]

Application of these principles to *LaFleur* dictates that it not be applied retroactively. *LaFleur* was a decision of first impression and its resolution was not clearly foreshadowed. Indeed, it reversed *Cohen* v. *Chesterfield County*

To Recall Mandate, pp. 5-10 (filed May 2, 1980); Supplemental Brief for Appellants, Clarence S. McClure, Comer Smith, Douglas White, Allen Kindrick, Carl M. VanFossen, H. Edward Chapman and Rodger Rinehart, Jr., pp. 22-27 filed on behalf of the members of Respondent Albemarle County School Board (filed October 27, 1978) (addressing retroactivity of *Monell* and *LaFleur*); Suggestion for Hearing En Banc (filed September 19, 1978).

[6] *See Lemon* v. *Kurtzman,* 411 U.S. 192, 197-99 (1973). *See also City of Phoenix* v. *Rolodziejski,* 399 U.S. 204 (1970), *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969).

[7] 404 U.S. at 106-07.

Board of Education, 474 F.2d 395 (4th Cir. 1973), an en banc decision, which confirmed the validity of similar maternity leave policies. Despite the fact that such policies had found widespread acceptance, the Albemarle and Henrico School Boards rescinded their policies in 1972, two years prior to this Court's decision in *LaFleur.* Thus, retrospective application will not further the operation of *LaFleur.* Such an application can only produce substantial, inequitable results by penalizing public school systems whose officials were unable to discern the evolution of constitutional law. Moreover, it would be doubly inequitable to couple a retroactive application of *LaFleur* with the financial penalties brought by a retroactive application of *Owen* and *Monell.* This is particularly true in this case where neither teacher sought reinstatement to her position.

As with *LaFleur,* the *Chevron* principles require that *Owen* and *Monell* not be applied retroactively. Together *Owen* and *Monell* strip municipal bodies of all immunity. In *Monell,* the Court overruled *Monroe* v. *Pape,* 365 U.S. 167 (1961) and held that municipal bodies are "persons" within the meaning of 42 U.S.C. § 1983. This eliminated the absolute immunity to suit under § 1983, previously held by municipal bodies. In *Owen,* the Court ruled that municipalities are not entitled to a qualified "good faith" immunity. Mr. Justice Powell observed in his dissent in *Owen* that *Owen* "inexplicably departs from this Court's prior decisions under § 1983."[8] He noted that under *Owen* and *Monell* "municipalities will have gone in two short years from absolute immunity under § 1983 to strict liability."[9] It cannot be denied that *Monell* overruled clear past precedent and neither it nor *Owen* was foreshadowed. Until *Owen-Monell,*

[8] 48 U.S.L.W. at 4399 (J. Powell, dissenting).
[9] *Id.* at 4401.

municipal bodies or their officials could be held liable for money damages only if they acted in bad faith. *Owen-Monell* clearly overturns this past state of the law.

Owen and *Monell* demand a new approach to decision-making by public bodies. Prior to those decisions, this Court suggested that public bodies and officials must be free to pursue decisions vigorously because such an approach to decision-making would enhance the public good.[10] After *Owen* and *Monell* a new standard of conduct is required for and a new consideration is injected into official decision-making. When confronted with a claim of possible constitutional violation if certain action is taken, the municipal body must now gauge the effect on the local treasury of a future adverse ruling by a court even though the contemplated action seems constitutional under the existing state of the law.[11] Under the new policy of *Owen-Monell* municipal bodies now must exercise extreme caution.

Even if the dramatic shift of emphasis caused by *Owen-Monell* is appropriate, retroactive application of those cases will not further their operation. To the contrary, such a result will produce substantial inequities and may lessen respect for the law as a guiding principle. After *Owen-Monell* municipal bodies are on notice of the stricter standard to be applied to their decision-making and of the need to have adequate financial reserves or insurance to cover any wrong decisions. Petitioners suggest that municipal decisions made many years prior to *Owen* and *Monell* when there was no need for insurance should be judged by the radically different standards first articulated in those cases. This would be unfair.

In light of the new rule enunciated in *Owen,* municipal

---

[10] *See Scheuer* v. *Rhodes,* 416 U.S. 232 (1974).
[11] *See* 48 U.S.L.W. at 4397.

bodies now may plan for the threat of financial liability based upon future changes in constitutional requirements by insuring or setting aside funds. The Albemarle and Henrico County School Boards had no reason to seek insurance or to set aside funds to cover claims such as Mrs. Paxman's and Mrs. Gough's. It would be inequitable and unfair to impose monetary damages on respondents by a retroactive application of *Owen, Monell* and *LaFleur.*

Historically, some courts have lessened the impact of judicial abolition of immunity by applying such decisions purely prospectively so that they do not even affect the merits of the case in which the new rule was announced.[12] Other courts have lessened the impact of abolition of immunity by limiting the retroactive effect of the new rule to the case that established the rule, under what is referred to as the "reward" theory.[13]

Commentators as well have advocated the nonretroactive application of decisions that abrogate doctrines of charitable and governmental tort immunity. One com-

---

[12] *See, e.g., Colby* v. *Carney Hospital,* 254 N.E.2d 407 (Mass. 1969); *Williams* v. *City of Detroit,* 111 N.W.2d 1 (Mich. 1961); *Spanel* v. *Mounds View School District,* 118 N.W.2d 795, 803-04 (Minn. 1962); *Hicks* v. *State of New Mexico,* 544 P.2d 1153, 1158-59 (N.M. 1975).

[13] *See, e.g., Jackson* v. *City of Florence,* 320 So.2d 68, 74-75 (Ala. 1975); *City of Fairbanks* v. *Schaible,* 375 P.2d 201, 211 (Alaska 1962); *Parish* v. *Pitts,* 429 S.W.2d 45, 52-53 (Ark. 1968); *Smith* v. *State of Idaho,* 473 P.2d 937,950 (Idaho 1970); *Molitor* v. *Kaneland Community Unit District No. 302,* 163 N.E.2d 89, 97-98 (Ill. 1959), *cert. denied,* 362 U.S. 698 (1960); *Parker* v. *Port Huron Hospital,* 105 N.W. 2d 1 (Mich. 1960); *Jones* v. *State Highway Commission,* 557 S.W.2d 225, 231 (Mo. 1977); *Brown* v. *City of Omaha,* 160 N.W.2d 805, 809 (Neb. 1968); *Merrill* v. *City of Manchester,* 332 A.2d 378, 383-84 (N.H. 1974); *Becker* v. *Beaudoin,* 261 A.2d 896, 902 (R.I. 1970); *Holytz* v. *City of Milwaukee,* 115 N.W.2d 618, 626 (Wis. 1962); *Kojis* v. *Doctors Hospital,* 107 N.W.2d 292 (Wis. 1961); *Oroz* v. *Board of County Commissioners,* 575 P.2d 1155, 1159 (Wyo. 1978).

mentator notes that "courts should allow the public entities time in which to re-evaluate their fiscal policies and prepare to meet their new responsibilities through insurance or additional revenue appropriations." [14] While *Owen* and *Monell* abrogate a different type of immunity, the above rationale and the reasoning of the previously cited state court cases are equally applicable to compel a nonretroactive application of *Owen* and *Monell*. Through nonretroactive application, a change such as *Owen-Monell* may be made without denying to the municipal body the necessary time to incorporate the new stricter standard into its decision-making process and to provide insurance and other protection of its existing programs.

The majority in *Owen* clearly intended municipal bodies to consider and incorporate the new, stricter rule in future decision-making. "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." [15] To apply *Owen* and *Monell* to municipal decisions made prior to *Owen* would in no way be an incentive for officials to "err on the side of protecting citizens' constitutional rights." Moreover, such a retroactive application of *Owen* and *Monell* could severely and adversely affect public schools already struggling to supply quality education in an economy of rising costs. Here petitioners make very clear that there is a class of school teachers in addition to themselves waiting in the wing for

---

[14] Comment, *The Role Of the Courts In Abolishing Governmental Immunity,* 1964 DUKE L.J. 888, 898-99. *See* Currier, *Time and Change In Judge-Made Law: Prospective Overruling,* 51 VA.L.REV. 201 (1965).

[15] 48 U.S.L.W. at 4397.

the respondents.[16] To apply these decisions retroactively would mean that funds otherwise available for programs in the schools must be used for back pay claims of teachers who never asked to come back to work after their pregnancies.

In *City of Los Angeles* v. *Manhart*, 435 U.S. 702, 718-25 (1978), seven Justices of this Court agreed to deny retroactive readjustment of sex differentiated employee contributions to pension funds based upon a concern for the financial stability of insurance and pension plans throughout the country. The Court found that sex based differentiation in pension contributions violated Title VII's prohibition of classifications based on sex. However, the Court refused to permit retroactive relief in the form of pension adjustment because "retroactive liability could be devastating for a pension fund."[17] Similarly, in addressing the retroactive application of *Owen*, this Court must consider the financial effect of a retroactive application of *Owen* and *Monell* on local public schools.

Under the *Chevron* analysis, *Owen*, *Monell* and *LaFleur* should not be applied retroactively. The decisions were not foreshadowed; retroactive application will not further the policy of *Owen*, *Monell* or *LaFleur* and the equities favor a nonretroactive application, thus lessening the impact of judicial abrogation of municipal immunity.

Even if the prior decisions of this Court do not necessitate a nonretroactive application of *Owen*, *Monell* and *LaFleur*, this Court should not summarily apply these decisions retroactively to *Paxman*, as requested by petitioners, without full briefing and argument of the question of retroactivity,

---

[16] *See* Petition For Writ of Certiorari, p. 7.
[17] 435 U.S. at 722.

which will impact substantially upon localities and their schools.

CONCLUSION

For the foregoing reasons, respondents urge the Court to deny the Petition For Writ of Certiorari. In the alternative, if the Court grants the writ respondents urge the Court to consider the question of retroactivity maturely and not reverse summarily the actions of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JAMES L. SANDERLIN
JOHN W. BURKE, III
McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219
(804) 644-4131
Attorneys for
Albemarle County School Board

WILLIAM G. BROADDUS
County Attorney for Henrico County
County of Henrico
P. O. Box 27032
Richmond, Virginia 23273
(804) 747-4342
Attorney for
Henrico County School Board

September, 1980

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 75-1506, et al.

SUSAN PAXMAN and LESLIE GOUGH,
Appellees,

v.

DR. W. E. CAMPBELL, Division Superintendent, Henrico County Public Schools;
MRS. JOHN DECESEBIO, Member Henrico County School Board;
CECIL CHILDRESS, Member, Henrico County School Board;
MRS. BETTY McMULLIN, Member, Henrico County School Board;
CECIL F. JONES, Member, Henrico County School Board;
OLIVER J. SANDS, JR., Member, Henrico County School Board;
REV. WALTER WHITT, Member Henrico County School Board, *Appellants.*

Filed July 22, 1980, U.S. Court of Appeals

On Motion for Recall of Mandate

Appellees, Susan Paxman, et al., have moved for the recall of our mandate so that we may consider amendment or reversal of our decision of this appeal in the light of Owen v. City of Independence, 48 U.S.L.W. 4389 (U.S. April 16, 1980).

The appellees' application for relief should be presented

in the first instance to the district court pursuant to Federal Rule of Civil Procedure 60(b). *See* 11 Wright & Miller, Federal Practice and Procedure §§ 2863 at 208-10 & n.12; 2864 at 223-24 and nn.51, 52, 53 (1973). Recall of our mandate is unnecessary. Standard Oil Company v. United States, 429 U.S. 17 (1976). We, of course, express no opinion on whether the appellees are entitled to the relief they seek.

WHEREUPON, it is ADJUDGED and ORDERED that the motion to recall the mandate is denied.

FOR THE COURT:

Clement F. Haynesworth, Jr.

see 80

451

see 80

452